

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

United States of America

v.

Docket No. 7:22-CR-1

Jerald Gray

Defendant's assented-to motion to continue

This case involves the government's use of a mostly untested algorithm by which the government determined that it was likely (in their estimation) that Mr. Gray's computer downloaded child sexual abuse material from the peer-to-peer file sharing system, FreeNet. The government has been using this technique in some form since 2011, and the expert who developed the technique for the government claims that it has a near-perfect error rate. Despite the expert's claims that the system rarely or never fails, few reported cases even mention the word *FreeNet*.

The defense has requested supplemental discovery based on the government's initial disclosures. After reviewing that material, the defense is likely to retain an expert to examine the government's algorithm and the process used. Only after additional discovery is complete will counsel be able to determine whether to challenge the adequacy of the government's search warrant. The Eighth Circuit¹ addressed a similar issue in 2020, and the Third Circuit² is currently considering an appeal as well. But just as the appeal pending in the Third Circuit raises a narrower issue than was considered in the Eighth Circuit, counsel anticipates, should this case involve a suppression hearing, the issue would be similar, but more narrowly tailored. As such, Mr. Gray requests the Court continue his trial, currently scheduled for March 23. Mr. Gray specifically relies on 18 USC

¹ *United States v. Dickerman*, 954 F.3d 1060 (8th Cir. 2020)

² *United States v. Nathan Weyerman*, Appeal No. 21-1896

3161(h)(7)(B)(ii), as this case is likely to present novel legal questions to the court to consider and complex issues of computer networking, statistics, and mathematical formula. As alternative grounds, counsel for Mr. Gray is scheduled to be in trial in Abingdon on March 23 in a multi-defendant case that has been pending for more than a year. The government does not object to the relief sought. Mr. Gray waives his right to a speedy trial from the currently scheduled trial date until the court is able to reset the case.

Respectfully submitted,

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